89-539 (3)

CASE NO.

in the

Supreme Court

of the

United States of America

OCTOBER TERM, 1988

JOSEPH ONDRIZEK and CONSTANCE ONDRIZEK
individually and as guardians for
ALISON, AUSTEN and IAN ONDRIZEK,

Petitioners,

vs.

FLORIDA DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES and
NORTH CENTRAL FLORIDA COMMUNITY
MENTAL HEALTH CENTER, INC.,

Respondents.

**Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

J. DANIEL ENNIS, ESQ.
Merritt & Sikes, P.A.
Attorneys for Respondent,
NORTH CENTRAL FLORIDA
COMMUNITY MENTAL HEALTH
CENTER, INC.
111 Southwest 3rd Street
3rd Floor, McCormick Bldg.
Miami, Florida 33130-1989
(305) 371-3741

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TABLE OF CITATIONS

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STATEMENT OF THE CASE

Plaintiffs filed this action for damages under the Federal Civil Rights Statute and a common law theory of negligence invoking Federal District Court jurisdiction pursuant to 28 USC §13.31, §13.43, §22.01, §22.02, and pendent State jurisdiction. Plaintiffs alleged violations of their constitutional rights: to due process, equal protection, violation of the Rehabilitation Act, and State common law negligence.

The Florida Department of Health and Rehabilitative Services (HRS) was dismissed under the Eleventh Amendment Immunity Doctrine.

North Central Florida Community Mental Health Center, Inc. (MHC), after extensive discovery, filed a Motion for Summary Judgment upon all Federal questions and a Motion to Dismiss the State pendent action for lack of jurisdiction.

The Federal District Judge granted both motions and subsequently final judgment was entered based upon the Order granting these motions.

Plaintiffs appealed all District Court judgments pertaining to both Defendants, HRS and MHC, to the Eleventh Circuit Court of Appeals, which affirmed the District Court.

Plaintiffs now seek a Writ of Certiorari from this Court.

STATEMENT OF THE FACTS

The *Statement of Facts* contained in the Petition for Writ of Certiorari filed with this court dehors the record in the lower tribunal. Respondent, NORTH CENTRAL FLORIDA COMMUNITY MENTAL HEALTH CENTER, INC. ("MHC"), states herein only those facts germaine to the Ondrizeks' causes of action alleged against it as shown by the record below, and as set out in the Order of the Federal District Judge in granting MHC's Motion for Summary Judgment which Order was Per Curiam Affirmed by the Eleventh Circuit Court of Appeal. The District Court's Order is included in the appendix to this brief as well as the decisions of the Eleventh Circuit Court of Appeals as pertains to this Respondent. (Res. App. 1A-7A and Res. App. 1B-9B and 1C-3C).

Paraphrasing the facts in the District Court Order (App. 1A-7A), they are as follows:

In early 1984 because of the mental illness of his wife, Constance Ondrizek, Joseph Ondrizek placed the care of their three children, Alison, Ian, and Austen, with his sister, Mary Devlin, and her husband who lived in Gainesville, Florida. Mrs. Devlin suspecting that Alison, a little girl, had been sexually abused filed a complaint with the Florida Department of Health and Rehabilitative Services (HRS). HRS referred Mrs. Devlin to MHC for the evaluation and treatment of Alison where she was seen by Dr. Sandra Sullivan at least four times. Dr. Sullivan did not furnish HRS with a formal written report, nor was she asked to testify at any of the dependency court hearings that followed, nor

were any of MHC's records ever used in any court proceeding. MHC's Director testified that a patient's medical file is released only upon signature of the patient's legal guardian or by court Order.

In May of 1985 a dependency hearing was held in the Circuit Court upon a Petition prepared by HRS alleging that the Ondrizek's had neglected and abused their children. The Ondrizeks did not attend the hearing because they were not notified. This Court on May 23, 1985 entered an Order for emergency detention of the children. No evidence from MHC was used at this hearing.

HRS filed a second Petition on May 30, 1985 and the Court issued a Summons to the parents advising them of a hearing on June 19, 1985. At that hearing HRS opposed the Ondrizeks' efforts to regain custody of their children. No evidence from MHC was used at this hearing.

The Court eventually returned custody of the children to their parents and the Ondrizeks filed this action against HRS and MHC in 1987 in the Federal District Court of the Southern District of Florida.

REASONS FOR DENYING WRIT

POINT II

CAN A PRIVATE PERSON ONLY BE HELD LIABLE IN A CIVIL RIGHTS SUIT BROUGHT UNDER 42 U.S.C. §1983 FOR ACTIONS THAT AMOUNT TO A "PUBLIC FUNCTION"?

(POINTS II AND III ONLY PERTAIN TO RESPONDENT MHC)

This question as presented is inappropriate to the judgment and decision of the lower tribunals. The district court found that the evidence was "devoid of any facts that might be construed to find that MHC acted under color of state law"; and. . . "since MHC performed no act that may be defined as a public function, it did not act under color of state law for purposes of liability under 42 U.S.C. §1983."

In addition to finding that there was no evidence that MHC in treating the child Allison Ondrizek was a public function under color of state law, the district court found that this treatment did not infringe upon any of the Plaintiffs' Constitutional Rights because the treatment provided to the child played no part in the dependency petitions filed in court by HRS, which said petitions are the gravamen of Plaintiffs' complaint. In other words, nothing MHC did affected anything HRS did regarding the Ondrizek's children and the children's parents, Joseph and Constance Ondrizek. The Eleventh Circuit Court of Appeal Per Curium Affirmed the district court. (App. 1C-3C).

It was the lack of evidence that caused the adverse judgment and the appellate decision against the Plaintiffs, not any theory of recovery under §1983 or any other Civil Rights cause of action as Petitioners have attempted to suggest in drafting their Point II.

Although neither of the lower tribunals used the exact term, in effect, each court found that there was no "nexus" or "proximate cause" between any act of MHC and the alleged infringement of the Plaintiffs' Constitutional Rights. Each court found that MHC did no act that caused such an infringement to any of the Petitioners.

In summary, both lower tribunals found that not only did MHC not perform a "public function under color of state law" but in addition, each found that MHC did *no act* that caused an infringement upon the Constitutional Rights of any of the Petitioners. (Order of the District Court, App. 5A. Eleventh Circuit Opinion, App. 2C-3C).

To prevail in a 42 U.S.C. §1983 cause of action, a plaintiff must show two essential things: First—that the acts of the named defendant were done "under color of state law".[1]

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[1] *United States v. Classic*, 313 U.S. 299, 326 (1941).

> "Misuse of power possessed by virtue of state law and made possible *only* because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

See, also: *Monroe v. Pape*, 365 U.S. 167 (1961). *United States v. Price*, 383 U.S. 787,794 N.7.

(Footnote Continued)

Second—that the acts of the named defendant *caused* the violation of plaintiffs' Constitutional Rights.[2]

If either of these two elements are missing from the plaintiffs evidence, he has no §1983 case.

In this case, Petitioners could prove neither of these two essential elements.

Pursuant to Rule 17.1(a)(c) of this court, Petitioners have not demonstrated in their Brief that the decision reached by the lower tribunal in this case conflicts with any decision of this court or any other court in the federal judicial system as relates to the Respondent, MHC.

(Footnote 1 Continued)

"In cases under §1983, "under color" of law has consistently been treated as the same thing as 'state action'."

[2]**CAUSATION:**

The Supreme Court has made clear that an analysis of liability under §1983 must focus on the question of causation, the "affirmative link" found lacking in *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976). The court has emphasized that the language of the statute imposes liability on any person who "subjects", or "causes to be subjected" another person to a violation of his constitutional rights under "color of law". For example, in the area of municipal liability, the Supreme Court has held that the essential issue is whether the conduct of the municipality can be described as a *cause* of the immediate incident from which Plaintiff suffered. *Monell v. Department of Social Services*, 436 U.S. 658, 692 (1978):

(Footnote Continued)

Petitioners cite two cases: *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2767, 73 L.Ed.2d 418 (1982) and *Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982). The *Kohn* case relative to §1983 supports the position of MHC and the *Milonas* case is clearly distinguishable on the facts.

In *Milonas*, a private school used a "behavioral-modification" program, allegedly violative of §1983, on youths placed at the school involuntarily by juvenile courts and other state agencies. This school was also a corrective and detention facility. Some students were

(Footnote 2 Continued)

"Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to suffer another to a tort suggests that Congress did not intend §1983 liability to attach where such causation was absent."

Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791.

". . . *Monell* must be taken to require proof of a City's policy different in kind from this later example before a claim can be sent to a jury on the theory that a particular violation was "caused" by the municipal "policy". At the very least there must be an *affirmative link* between the policy and the particular constitutional violation alleged." (Our emphasis).

Id. 105 S.Ct. at 2436.

Simply stated the acts complained of *must be* the proximate cause of the violation of the Plaintiff's constitutional rights before there is liability under §1983. If the acts or omission are not the proximate cause then no cause of action lies under §1983.

restricted to the grounds, others were confined—locked in and up. If a student left without permission, he was hunted down, taken into custody and returned. In short, the school derived its authority over the students from the state. Under these facts, the Tenth Circuit held that the state institutionalized students still had their liberty interests protected from state action by the Fourteenth Amendment and in consequence of this, the defendants were amenable to a §1983 action.

The facts of *Milonas* are not even remotely similar to the facts of this case. Mary Devlin, the aunt of Allison Ondrizek, was referred by HRS to MHC so that the child suspected of being sexually abused, could receive treatment and evaluation. MHC never sent any report to HRS, nor were its records or the testimony of MHC's Dr. Sandra Sullivan used by HRS in any subsequent court proceeding involving the Ondrizek's. The unrebutted evidence was that MHC's records of its patients are never released without written authorization from the patient's legal guardian or by court order.

Petitioners have not demonstrated pursuant to Rule 17.1(a)(c), a conflict between the decision in this case with any decision from this court or with any decision of any lower tribunal in the federal court system. Neither have Petitioners shown any other grounds cognizable under the rules of this court as a basis for the granting of this Petition for Writ of Certiorari.

The Petition should be denied.

POINT III

IS A DISTRICT COURT PRECLUDED FROM EXERCISING PENDANT JURISDICTION OVER A STATE LAW CLAIM WHEN FEDERAL CLAIMS WHICH OTHERWISE PROVIDED THE SOLE BASIS FOR SUBJECT MATTER JURISDICTION HAVE BEEN DISMISSED?

Petitioners totally misaprehends a federal court's jurisdiction over state civil law actions under pendant jurisdiction. Pendant jurisdiction is a doctrine of discretion, not of plaintiff's right. *United Mine Workers v. Gibbs*, 385 U.S. 715 (1966).

Where no basis exist for federal court jurisdiction of a state's civil action, a federal court may, in its discretion, accept jurisdiction of such action if the facts giving rise to the state action arose from a common nucleus of operative facts which also include a federal cause of action, using guide-line criteria established in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). *See* also, *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614, 618 (1988).

Gibbs and *Cohill* mandate that the federal court should generally decline to exercise jurisdiction where all the federal claims are dismissed before trial. *Cohill*, 108 S.Ct. at 618-19; *Gibbs*, 383 U.S. at 726-27. However, the federal court has discretion to assert pendant jurisdiction in such cases. *Cohill*, 108 S.Ct. at 619 N7.

The district court in this case after granting MHC a summary judgment on all federal claims asserted by the Ondrizeks made a *Gibb's* analysis finding that the remaining claim "was and is a state law claim", that the claim was not time-barred in state court, and that there exists a state forum to entertain this state claim. (App. 6A). After making these findings, the judge exercised his discretion afforded him by *Gibbs* and *Cohill* and dismissed the state law claim. Factually, this case is controlled by *Gibbs*, since both here and in *Gibbs* the place of original filing was in the federal court, whereas, in *Cohill* plaintiff's claim was filed first in the state court and subsequently removed to the federal court, thus presenting to the Supreme Court a question whether pursuant to 28 U.S.C. §1441-1451, the district court had discretion to remand the case back to the state court.

In *Gibbs*, the court gave several examples where the exercise of discretionary jurisdiction over state claims would be improper, one of which was where the federal claim is dismissed before trial. *Gibbs*, 383 U.S. at 726-727; See also, *Aldinger v. Howard*, 427 U.S. 1 (1976) where it was held that since a municipality could not be sued under §1983, there was no basis for federal jurisdiction on the state claim.

CONCLUSION

No grounds for granting the Writ of Certiorari having been demonstrated, it is respectfully submitted that the Writ be denied.

Respectfully submitted,

MERRITT & SIKES, P.A.
Attorneys for Respondent,
NORTH CENTRAL FLORIDA
COMMUNITY MENTAL HEALTH
CENTER, INC.
111 S.W. 3rd Street
3rd Floor, McCormick Building
Miami, Florida 33130-1989
(305) 371-3741

By: _____
J. DANIEL ENNIS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to Rule 28(3), Supreme Court Rules, that three (3) true and correct copies of Respondent's Response to Petition for Writ of Certiorari to the Supreme Court of the United States was mailed this ____ day of May, 1989, upon: BRET CLARK, ESQ., Attorney for Petitioner, P.O. Box 53-1131, Miami Shores, Florida 33153 and to JASON VAIL, ESQ., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050.

Such service is in accordance with Rule 28(3), Supreme Court Rules.

By: _____

J. DANIEL ENNIS
Attorney for Respondent,
NORTH CENTRAL FLORIDA
COMMUNITY MENTAL HEALTH
CENTER, INC.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 87-682-Civ-Atkins

JOSEPH and CONSTANCE ONDRIZEK, ETC., ET. AL.

Plaintiffs,

v.

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES and NORTH CENTRAL FLORIDA COMMUNITY MENTAL HEALTH CENTER, INC.,

Defendants.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the court on defendant North Central Florida Community Mental Health Center, Inc.'s ("MHC") motion for summary judgment and motion to dismiss the pendent state law claim. After careful consideration of all the documents submitted and the relevant law, it is ORDERED AND ADJUDGED that this motion is *GRANTED*. In addition, the motion to dismiss the pendent state law claim is granted.

Early in 1984, the plaintiff Constance Ondrizek, suffering from a mental disorder, was hospitalized for

several weeks. During this period, the Ondrizeks entrusted the care of their children, Alison, Ian, and Austen, to Joseph Ondrizek's sister and her husband, Mary and Richard Devlin. After Alison began to exhibit bouts of unusual behavior, Mary Devlin, suspecting that the child had been sexually abused, filed a complaint with the Florida Department of Health and Rehabilitative Services ("HRS").

HRS referred Alison to the defendant MHC for evaluation and treatment where she was seen by Dr. Sandra Sullivan on at least four occasions. *See* Deposition of James Winters at 21. Dr. Sullivan did not furnish HRS with a formal written report, nor was she asked to testify at any of the dependency hearings that ensued. *See* Deposition of Sandra Sullivan at 28; Deposition of James Winters at 25. In fact, a patient's medical file is released only upon signature of the patient's legal custodian. *See* Deposition of James Winters at 25.

During May of 1985, a dependency hearing was held in the circuit court in Alachua County to consider a detention petition prepared by HRS which alleged that the Ondrizeks had abused and neglected their children. The Ondrizeks were not present at the hearing. On May 23, 1985, the court entered an ORDER for Emergency Detention.

On May 30, 1985, HRS filed a second petition. The Alachua Juvenile Court issued a summons to the Ondrizeks advising them of a hearing on June 19, 1985. At that hearing, HRS opposed the Ondrizeks' efforts to regain the custody of their children. The court set a trial

for August of 1985. On August 8, the Juvenile Court witheld adjudication of dependency and placed the children with relatives in North Miami and the Ondrizeks were granted reasonable visitation. HRS was directed to file a petition seeking return of the children to the Ondrizeks. The children were returned to their parents in January of 1986 and the Ondrizeks filed this action against HRS and MHC in 1987.

The plaintiffs filed this action for damages under the federal civil rights statutes and common law theory of negligence invoking this Court's jurisdiction pursuant to 28 U.S.C. section 1331, 1343, 2201, 2202 and pendent jurisdiction. The plaintiffs allege violations of their constitutional right to due process, right to equal protection, violation of the Rehabilitation Act, and negligence. The defendant HRS was dismissed under the Eleventh Amendment immunity doctrine. MHC now seeks summary judgment on the civil rights claims and dismissal of the pendent state law claim.

The plaintiffs seek to impose liability on the defendant MHC under 42 U.S.C. section 1983 for alleged violations of their civil rights. Count I alleges that the plaintiffs' right to enjoy an interpersonal relationship as a family, free from ur due interference by the government, was placed in jeopardy without affording them a full and fair opportunity to be heard. Count II alleges that the plaintiffs right to be free from unreasonable discrimination on the basis of a mental handicap was violated because a substantial, if not overridding, motive behind the defendant's actions was Constance Ondrizek's illness. Count III alleges that Constance Ondrizek's mental illness qualifies her as a

handicapped individual as defined by the Rehabilitation Act, 29 U.S.C. section 794, and the plaintiffs suffered discrimination by reason of her illness. Finally, Count IV alleges that the defendant MHC acted negligently in its evaluation of Alison Ondrizek and that HRS acted negligently in its investigation and filing of the detention petitions.

Title 42 U.S.C. section 1983 requires that a plaintiff show that the defendant acted under color of state law to deprive them of a right protected by the constitution and laws of the United states. *See White v. Scrivner Corp.*, 594 F.2d 140, 141 (5th Cir. 1979) (citing *Flagg Bro.s, Inc. v. Brooks*, 436 U.S. 144 (1970)). The complaint and the depositions filed in support of the motion for summary judgment are devoid of any facts that might be construed to find that MHC acted "under color of state law." The plaintiffs acknowledge that the defendant MHC is a private corporation. *See* Plaintiffs' Memorandum of Law in Reply (sic) to Defendant's Motion for Summary Judgment at 8. It is true that a private indivdaul's performance of public functions may be attributed to the state. *See White v. Scrivner Corp.*, 594 F.2d at 142. The Supreme Court has determined, however, that such an attribution of state action to a private individual is appropriate only when it performs a function that is "exclusively reserved to the state." *Flagg Bro.s, Inc. v. Brooks*, 436 U.S. at 157. The plaintiffs here urge that the defendant's evaluation and treatment of the child was a public function. Such a result is unwarranted. The definition of public function is very narrow. It includes activities such as the conduct of elections. *See, e.g., Terry v. Adams*, 345 U.S. 461 (1953), and the performance of municipal functions in

a "company town." *See, e.g., Marsh v. Alabama*, 326 U.S. 501 (1946). No basis exists for finding that evaluation and treatment of a child for suspected child abuse is a public function. The facts show that MHC evaluated and treated the child, made no formal recommendation to HRS, did not participate in the filing of the detention petitions, did not attend or otherwise participate in the dependency hearings. Since MHC performed no act that may be defined as a public function, it did not act under color of state law for the purposes of liability under 42 U.S.C. section 1983.

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and affidavits show that there exists no genuine issue of material fact. Fed.R.Civ.Pro. 56(a). The Supreme Court has moved a step further by interpreting Fed.R.Civ.Pro. 56(A) as mandating entry of summary judgment after a sufficient time for discovery, upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will have the burden of proof. *See Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552-53 (1986). The standard for summary judgment mirrors that for a directed verdict under Fed.R.Civ.Pro. 50(a) and asks if the evdience is so one sided that one party must prevail as a matter of law. See Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2511 (1986). Although the moving party has the burden of demonstrating the basis of its motion, the opposing party must produce evidence in the form of specific facts that would support a jury verdict. Mere denials or allegations are not sufficient to form a genuine issue of material fact. *See Anserson*, 106 S.Ct. at 2514.

In the instant case, the defendant has anply demonstrated to the court the basis of its motion. The plaintiffs have failed to present evidence that there exists a genuine issue of material fact and therefore defendant's motion for summary judgment is granted on Counts I, II and III.

Implicit in the concept of pendent jurisdiction is the existence of jurisdiction over the parties involved because of diversity or because of the presence of a federal question. *See Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985). A federal court may exercise pendent party jurisdiction over a party whose claim asserts purely state law violations if that claim arose from a common nucleus of operative facts that gave rise to a federal claim against another party properly before the court. Questions of judicial economy dictate that the claims be tried together. *See Giardiello v. Ba;lbao Insurance Co.*, ____F.2d____ (11th Cir. 1988). Such is not the case before this court which has no independent jurisdiction to consider the state law claim. Unlike *Giardiello*, the situation before this court did not give rise to a simultaneous federal basis for jurisdiction over this party or another. The claim was and is a state law claim. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."). Since the claim is not time barred, there exists a state forum to entertain a suit. *See Shahawy v. Harrisonb*, 778 F.2d 636 (11th Cir. 1985).

DONE AND ORDERED at Miami, Florida this 8th day of April, 1988.

(signed)
UNITED STATES DISTRICT JUDGE

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 87-5942, 88-5404, 88-5414
Non-Argument Calendar

D.C. Docket No. 87-0682

JOSEPH ONDRIZEK and CONSTANCE ONDRIZEK,
individually and as guardians for
ALISON AUSTEN and IAN ONDRIZEK,

Plaintiffs-Appellants,

versus

FLORIDA DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES and
NORTH CENTRAL FLORIDA COMMUNITY
MENTAL HEALTH CENTER, INC.,

Defendants-Appellees.

**Appeals from the United States District Court
for the Southern District of Florida**

(October 26, 1988)

Before FAY, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM

This case comes to us on appeal from the United States District Court for the Southern District of Florida. The district court dismissed the claims filed against the Florida Department of Health and Rehabilitative Services ("HRS") for lack of jurisdiction. We agree that the Eleventh Amendment barred the suit against HRS, and, therefore, affirm the district court's ruling.

The Ondrizeks sued both HRS and the North Central Florida Community Mental Health Center, Inc. ("North Central"). Joseph and Constance Ondrizek alleged that HRS and North Central unfairly deprived them of the custody of their children, Alison Austen and Ian Ondrizek, and, in so doing, violated their constitutional rights to due process and equal protection under 42 U.S.C. section 1983 (1982), and their rights under the Rehabilitation Act. 29 U.S.C. section 794 (1982 & Supp. III 1985). In addition, the Ondrizeks asserted that the defendants were guilty of common law negligence, and asked that the trial court consider the state law claims under the theory of pendent jurisdiction.

Initially, HRS did not respond to the Ondrizeks' complaint, and the district court entered a default judgment against it. The district court, however, granted HRS' motion to set aside the default based on "excusable neglect." Subsequently, HRS asserted immunity from the lawsuit based on the Eleventh Amendment. The district court agreed and dismissed the federal claims. In addition, the court stated that,

"[l]acking jurisdiction of the federal claims, this court is without the power to adjudicate the pendent state claim." However, the court did not dismiss the claim against North Central at that time.

The Ondrizeks have appealed the dismissal of HRS from the lawsuit to this court. They raise three arguemnts as to why the Eleventh Amendment does not bar their suit. First, they contend that the Eleventh Amendment, as written, was not meant to apply to suits brought by citizens of a state against their own states. Second, they argue that the Eleventh Amendment does not apply to suits that seek declaratory and injunctive relief. Third, they claim that, even if HRS *is* immune from suit, HRS has waived its immunity with respect to the federal claims by its procedural default, and has waived its immunity with respect to the state claim by its failure to raise the immunity defense. HRS disputes all of these contentions. Further, HRS states that this court has no jurisdiction to consider these questions because there was never a final appealable judgment.

Before we can consider any of the Ondrizeks' contentions, we must determine whether HRS is correct in asserting that we have jurisdiction to decide whether there is jurisdiction. HRS argues that, because the district court's order did not dismiss North Central from the case, there is no final order from which the Ondrizek's can appeal. We agree that, in general, when there has been no final order, no appeal is possible. 28 U.S.C. section 1291 (1982); *see In re* Chicken Antitrust Litigation American Poultry, 669 F.2d 228, 235 (5th Cir. Unit B 1982). However, an order subsequently issued by the district court has finally resolved the case by

granting North Central's motion for sumary judgment. And, as this court stated in *Rivers v. Washington County Board of Education*, 770 F.2d 1010, 1011 (11th Cir. 1985) (per curiam), "courts will consider 'the seperate appeal of a nonfinal judgment where a subsequent judgment of the district court effectively terminates the litigation.' " (quoting Martin v. Campbell, 692 F.2d 112, 114 (11th Cir. 1982). Therefore, we can move on to the Eleventh Amendment questions raised in this appeal.

The Eleventh Amendment Bars Federal Suits brought by citizens against its (sic) own state

In 1890, the Supreme Court of the United States unequivocably declared that, under the Eleventh Amendment, federal courts do not have jurisdiction to consider claims brought against a state by its own citizens. Hans v. Louisiana, 134 U.S. 1, (1890). Although in recent years the doctrine has met with some criticism,[1] it has not been overruled by statue or by the Supreme Court. *See*, Papasan v. Allain, 478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209, 225 (1986) (adhering to *Hans* rule); Atascadero State Hospital v. Scanlon, 472 U.S. 234, 237-38 (1985) (following *Hans*). Because we are bound by Supreme Court precedent, we refuse to even consider the merits of the Ondrizeks' arguments in favor of overruling *Hans*.[2]

No exceptions apply to permit this lawsuit

Despite te general rule, "[t]here are . . . certain well-established exceptions to the reach of the Eleventh Amendment." *Antascadero*, 473 U.S. at 238. The Ondrizeks argue that their case falls within two of these execeptions. First, they claim that they have asked for injunctive as well as monetary relief. They argue that the Eleventh Amendment does not apply to suits in which injunctive relief or declaratory relief is sought, and that, therefore, the amendment does not operate to preclude the district court from considering their request for injunctive relief. Second, the Ondrizeks claim that HRS has waived its Eleventh Amendment immunity.

We reject both of these arguments. First, we acknowledge that, in some cases, equitable actions brought against state officials raise no Eleventh Amendment problems. *See* Edelman v. Jordan, 415 U.S. 651, 663-69 (1974). Because a state has no authority to instruct officials to engage in unconstitutional conduct, for example, "a suit challenging the constitutionality of a state official's action is not one against the State." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 102 (1984); Ex Parte Young, 209 U.S. 123, 160 (1908). Therefore, federal courts may hear such lawsuits without violating the Eleventh Amendment.

However, the Supreme Court has clearly distinguished the situation described above, in which a *state official* is sued, from one in which the state or a state agency is sued. In the latter cases, the Eleventh Amendment bar remains, whether the plaintiff has

sought legal or equitable relief. Papasan v. A;llain, 92 L.Ed.2d 209, 225-26 (1986); *Pennhurst*, 465 U.S. 89, 100-02 (1984). HRS is a state agency; therefore, Supreme Court precedent bars the Ondrizeks' claim for equitable relief as well as their claim for monetary relief.

Second, we find that there was no waiver of Eleventh Amendment immunity. HRS' initial procedural default has no effect because, as the Supreme Court declared in *Edelman*, the defense of Eleventh Amendment immunity "sufficiently partakes of the nature of a jurisdiction bar so that it need not be raised in the trial court." *Edelman*, 415 U.S. at 678. This bar is only lifted when a state clearly waives its immunity from suit in federal court in its constitution, its statutes, or its courts' decisions. Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 467 (1945); Silver v. Baggiano, 804 F.2d 1211, 1214 (11th Cir. 1986). The Florida constitution limits the state's ability to waive its immunity from suit. It states: "Provision may be made *by general law* for bringing suit against the state as to all liabilities now exisiting or hereafter originating." Fla. Const. art. X, section 13 (emphasis added). Thus, only an "explicit act of the state legislature" is effective to waive the state's Eleventh Amendment immunity. Tuveson v. Florida Governor's Council on Indian Affairs, Inc., 734 F.2d 730, 734 (11th Cir. 1984); *see also* Hess v. Metropolitan Dade County], 467 So.2d 297, 300 (1985) (reaching identical conclusion in context of state's sovereign immunity). Since Florida has not waived its Eleventh Amendment immunity in section 1983 cases, *see* Hill v. Department of Corrections], 513 So.2d 129, 133 (Fla. 1987), there is no basis for finding a waiver in this case.

Pendent state law claim

Finally, the Ondrizeks state that the district court erred in dismissing their pendent state claim. They concede that the court was not obligated to exercise jurisdiction over the state law claim, even if it had the power to hear those claims. In this case, however, the district court stated that it had no *power* to hear the claims because it had dismissed the federal claims. The Ondrizeks argue that the district court did have the power to hear the pendent claim even though the federal claims had all been dismissed prior to trial. Therefore, the Ondrizeks allege, the district court did not make the discretionary determination required of it by law and its decision cannot stand.

We disagree. The Ondrizeks are correct in stating that, whenever a district court has the power to hear a pendent state claim, it also has great discretion in determining whether to exercise that power. "Under [United Mine Workers v. Gibbs, 383 U.S. 715 (1966)], a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state law claims." Carnegie-Mellon University v. Cohill, 108 S.Ct. 614, 618 (1988). In cases in which the federal claims are all dismissed before trial, the federal court should generally decline to hear the state claims. *Cohill*, 108 S.Ct. at 618-19; *Gibbs*, 383 U.S. at 726-27. However, the federal court still has the discretion to assert pendent jurisdiciton in such cases. *See Cohill*, 108 S.Ct. at 619 n.7.

In this case, though, the federal court clearly had no power to embark on a *Gibbs* analysis. For, pendent jurisdicition does not override a state's immunity under the Eleventh Amendment. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 251 (1985); *Pennhurst*, 465 U.S. at 121; *Silver*, 804 F.2d at 1213. Thus, the Eleventh Amendment bars jurisdiction over even the pendent state claims brought against HRS, and the pendent jurisdiction question never really arose. Although the court *may* have had the power to exercise pendent jurisdiction if a non-state had been the defendant,[3] it had *no* power to exercise pendent jurisdiction over this claim.[4]

Conclusion

For all of the above reasons, we find that there was no jurisdiction in this case.

AFFIRMED.

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1. *See, e.g.,* Atascadero State Hospital v. Scanlon, 472 U.S. 234, 259-302 (1985) (brennan, J., dissenting) (discussing the language and history of the amendment to support the contention that "[t]here simply is no consitutional principle of state sovereign immunity, and no constitutionally mandated policy of excluding suits against states from federal court," *id.* at 259).

2. The Ondrizeks also suggest that the present Supreme Court would overrule *Hans* today if faced with the issue. Therefore, they argue, we should refuse to follow the existing Supreme Court precedent. However, we are bound by that precedent and will not try to predict how the Supreme Court would rule on the *Hans* issue today. If and when the Court overrules *Hans*, we will follow their dictate.

3. When there is no Eleventh Amendment problem and there is no compelling reason for a federal court to hear a state claim, it may constitute an abuse of discretion for a federal court to assert jurisdiction. *See*, Maguire v. Marquette University], 814 F.2d 1213, 1218 (7th Cir. 1987) (federal court erred in retaining jurisdiction where district court did not state, and record did not reveal, any "pressing" reasons for this action). In such a case, although a district court technically has discretion to reach its decision, it actually only has the ability to decide to dismiss the pendent claim.

4. For the same reason that HRS' initial procedural defect did not waive its Eleventh Aendnment immunity defense, HRS' initial failure to argue that the Eleventh Amendment bars the pendent state claims does not operate as a waiver of the defense.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 87-5942, 88-5404, 88-5414

JOSEPH ONDRIZEK and CONSTANCE ONDRIZEK, individually and as guardians for ALISON AUSTEN and IAN ONDRIZEK,

Plaintiffs-Appellants,,

versus

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES and NORTH CENTRAL FLORIDA COMMUNITY MENTAL HEALTH CENTER, INC.,

Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Florida

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Before FAY, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

This matter is before the Court upon appellants' petition for rehearing. As appellants' correctly point out, the three different appeals filed in this court have been the subject of some confusion. The first appeal, docketed as 87-5942, dealt with the district court's dismissal of the suit as agaisnt the Florida Department of Health and Rehabilitative Services (HRS). We affirmesd that ruling in a per curiam opinion dated October 26, 1988, which remains in full force and effect. While that opinion was being processed administratively, two other appeals were consolidated with the earlier one. These two new appeals, docketed as 88-5404 and 88-5514, dealt with the granting of summary judgment in favor of North Central Florida Community Mental Health Center, Inc. (MHC). Unfortunately, when our opinion issued on October 26, 1988, it was not noted that the appeals in 88-5404 and 88-5514 had been consolidated. The clerk issued the opinion under all three appellate numbers because the matters had been consolidated. Appellants correctly point out that we have not ruled upon the questions raised in the appeals dealing with MHC.

In brief, the district court granted summary judgment in favor of MHC based upon the absence of the "state action" required under 42 U.S.C. section 1983. As to that claim, we affirm the judgment for the reasons stated in the district court's Order Granting Defendant's Motion for Summary Judgment entered April 8, 1988.

Appellants also contend that the district court erred in granting summary judgment because of their alleged claim under the "Rehabilitation Act," 29 U.S.C. section 794. A review of the file, however, convinces us that there is simply no evidence that the defendant MHC discriminated in any way against appellants. The fact that MHC treated Connie Ondrizek does not, standing alone, equate with acts attempting to seperate the Ondrizek family. MHC cannot be held responsible for the actions taken by HRS or the state judicial officers involved. MHC was entitled to summary judgment on this claim and the ruling is affirmed.

The question of pendent jurisdiction was dealt with in our earlier opinion but, in addition, as to those state claims made against MHC we find no abuse of discretion by the district court in its refusal to retain jurisdiction.

The judgment of the district court is affirmed in all respects.